U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

(b)(6)

U.S. Citizenship and Immigration Services

DATE: MAY 10 2013 OFFICE: TEXAS SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the immigrant visa petition. The Administrative Appeals Office (AAO) rejected the petitioner's appeal as untimely and returned the petition to the director for consideration as a motion to reopen and reconsider. The director denied the motion. The petitioner then filed a second appeal. The AAO will dismiss the appeal.

The petitioner seeks classification under section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. The petitioner seeks employment as an international legal consultant at , a real estate investment firm in New York. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, the petitioner submits a brief and copies of previously submitted exhibits.

The petitioner filed the Form I-140 petition on her own behalf on May 3, 2009. The director denied the petition on September 29, 2009. In the denial notice, the director stated: "The appeal may not be filed directly with the Administrative Appeals Office." The director specified the proper address to file an appeal. Nevertheless, the petitioner attempted to file an appeal directly with the AAO on October 29, 2009. The AAO could not, and did not, accept that appeal. The petitioner refilled the appeal at the correct address on November 12, 2009, with a note, dated November 5, 2009, in which the petitioner acknowledged the misfiling of the appeal "contrary to [the director's] instructions."

On February 12, 2012, the AAO rejected the appeal as untimely under the U.S. Citizenship and Immigration Services (USCIS) regulation at 8 C.F.R. § 103.3(a)(2)(i). The AAO instructed the director to determine whether the untimely appeal met the requirements of a motion to reopen or a motion to reconsider, under the USCIS regulation at 8 C.F.R. § 103.3(a)(2)(v)(B)(2). The director determined that the untimely appeal did not meet those requirements, and therefore did not qualify for consideration as a motion. The director issued a decision denying the motion on April 25, 2012.

Section 203(b) of the Act states, in pertinent part:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. –
>
> > (A) In General. – Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.

(B) Waiver of Job Offer –

> (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director did not dispute that the petitioner qualifies as a member of the professions holding an advanced degree. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990, published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service [now USCIS] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

In re New York State Dept. of Transportation (*NYSDOT*), 22 I&N Dec. 215 (Act. Assoc. Comm'r 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, the petitioner must show that the alien seeks employment in an area of substantial intrinsic merit. Next, the petitioner must show that the proposed benefit will be national in scope. Finally, the petitioner must establish that the alien will serve the national interest to a substantially greater degree than would an available United States worker having the same minimum qualifications.

While the national interest waiver hinges on prospective national benefit, the petitioner must establish that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The intention behind the term "prospective" is to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

The USCIS regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered" in a given area of endeavor. By statute,

aliens of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, whether a given alien seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree, that alien cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in his or her field of expertise.

The petitioner filed the initial petition electronically. Electronic filings, by nature, do not include any supporting evidence. The confirmation notice, generated automatically upon the electronic filing of the petition on May 3, 2009, instructed the petitioner to "[s]end supporting documentation to [a specified] address." On June 9, 2009, having received nothing further from the petitioner, the director instructed the petitioner to submit documentation to support her petition and establish "that the exemption would be in the national interest." The petitioner's response to the director's notice included documentation of her advanced degrees and her legal credentials, establishing that the petitioner is a member of the professions holding an advanced degree as the USCIS regulations at 8 C.F.R. § 204.5(k)(2) define those terms.

The petitioner observed that her employer filed its own Form I-140 petition on her behalf on June 29, 2007, with an approved labor certification. If approved, the petition would convey a priority date of April 30, 2001. The director denied the petition, as well as a series of motions filed by the employer. USCIS records indicate that the director ultimately reopened the petition on December 23, 2009, and that the petition remains open. That petition is not before the AAO on appeal or motion.

The petitioner asked the director to take the approved labor certification into account in the present proceeding. By statute, the threshold for the waiver is that it will serve the national interest. There is no provision in the statute, regulations, or case law for an approved labor certification to qualify the petitioner for a waiver of the job offer requirement in a separate proceeding. The labor certification is only one element of the statutory job offer requirement; the denial of the employer's petition rested on the employer's claimed failure to meet another element of the job offer requirement. To approve the present petition based on the labor certification would amount to a waiver of the remaining elements of the job offer requirement, and the petitioner must still show that such a waiver is in the national interest.

The approval of a labor certification does not, by itself, require USCIS to approve a petition based on that labor certification, much less waive the job offer requirement outright for a different petition. As noted previously, the employer's petition remains pending, and it is proper to consider the approved labor certification in the context of that petition, but the approved labor certification is not relevant to the matter now at hand. That approval does not demonstrate or imply that it would serve the national interest to waive the job offer requirement in the present proceeding.

Regarding the merits of her waiver application, the petitioner stated:

> I truly believe that the United States needs someone like me because I can help American Investors in Turkey, I can protect their interests and I can help Turkish investors in here. I am a lawyer here and there. I am already helping my employer's

> real estate interests in Turkey, already reviewing legal documents in Turkish for one of the top law firms in the U.S. . . .
>
> I can help so many lawyers, so many companies [and] so many individuals who are dealing with a Turkish . . . entity. . . . In the same way, I can help Turkish nationals who are dealing with their American counterparts. . . .
>
> I am a member of International Trade Law Committee of New York City Bar Association. I represented New York City Bar Association in United Nations, UNCITRAL Public Procurement Law discussions. I have worked in Turkey with one of the top law firms on Turkish Banking and Trade Law.

The petitioner documented her credentials as an attorney, including academic records and certification of her admission to the New York bar. The petitioner also submitted documentation regarding the earlier approval of H-1B nonimmigrant visa petitions on her behalf.

The petitioner's former law school professors and past and present employers praised her work and abilities in general terms, but the letters predate the petitioner's application for the waiver, and they do not address issues related to the waiver. In identical letters respectively dated June 7 and 23, 2005, , president of stated that the petitioner "will continue to be a valuable member of our Company and we expect that her contribution will be critical to the continued growth of our Company." Mr. did not indicate that the benefits from the petitioner's work would extend beyond and its clients.

The petitioner asserted that Exhibit 17 of her submission showed evidence of recognition for achievements and significant contributions to the industry or field by peers, government entities, or professional or business organizations. Such recognition provides partial support to a claim of exceptional ability under the regulation at 8 C.F.R. § 204.5(k)(3)(ii)(F). Although exceptional ability does not ensure eligibility for the waiver, such recognition may carry significant weight depending on the nature of the recognition and of the achievements and contributions so recognized. The petitioner submitted three letters.

An October 24, 2002 letter from assistant dean of Student Affairs at New York, included a check for $250 for the petitioner "as the May 2002 recipient of the prize . . . awarded to the graduating student in the who attains the highest cumulative average." Academic performance, measured by such criteria as grade point average, cannot alone satisfy the national interest threshold or assure substantial prospective national benefit. *NYSDOT*, 22 I&N Dec. 219, n.6. Because the sole criterion for the prize is one's grade point average, the reasoning in *NYSDOT* applies here.

A September 21, 2007 letter from chair of the reads, in part: "You have been selected by the

to receive an award in great appreciation for your volunteer work with . . . I hope that you can attend the Reception in honor of our Pro Bono Volunteers." The letter does not identify any achievement or contribution beyond pro bono service in a local initiative. Pro bono legal services as a whole serve the national interest, but the impact of an individual attorney working pro bono would be so attenuated at the national level as to be negligible. *Id.* at 217, n.3.

The third letter, dated January 14, 2009, is from general counsel of the New York City Bar, and addressed to secretary of the . The purpose of the letter was to accept an invitation "to attend the fifteenth session of " The letter identified the three-person delegation, which included the petitioner. The record does not reveal how the petitioner came to be selected for the working group, and therefore the petitioner has not shown that this selection was a form of recognition for achievements or contributions. Even if it were, the record does not identify the achievements or contributions so recognized.

The director denied the petition on September 29, 2009, stating that the duties of a legal consultant do not automatically qualify the petitioner for the national interest waiver, and that the petitioner had not otherwise established eligibility for the waiver. On appeal from that decision, the petitioner requested oral argument. The regulations provide that the requesting party must explain in writing why oral argument is necessary. Furthermore, USCIS has the sole authority to grant or deny a request for oral argument and will grant argument only in cases involving unique factors or issues of law that cannot be adequately addressed in writing. *See* 8 C.F.R. § 103.3(b). In this instance, the petitioner identified no unique factors or issues of law to be resolved, and no specific reasons why the AAO should grant oral argument. Moreover, the written record of proceedings fully represents the facts and issues in this matter. Consequently, the AAO denies the petitioner's request for oral argument.

The petitioner again noted the existence of 's petition, which included an approved labor certification. The petitioner asserted that "[t]he labor process was exhausted by a U.S. employer," and requested that the AAO "consider the two petitions together."

The petitioner cited no statutory or regulatory provision that would allow the consolidation of two separate petitions in this way. A further complication is that, while the beneficiary filed the present petition on her own behalf, she did not file the other petition; filed it on her behalf, and the beneficiary has no standing with respect to that petition. *See* 8 C.F.R. § 103.3(a)(1)(iii)(B), which states that the beneficiary of a visa petition is not an affected party with standing in the proceeding. The proceeding to determine the outcome of 's petition is still open, and has no direct effect on the present proceeding.

With respect to the petitioner's assertion that she has "already satisfied the requirement of an approved labor certification," the statutory standard for the waiver of the job offer requirement is that the waiver must be in the national interest. It cannot suffice that, at some point in the past, the petitioner received a

labor certification in a separate proceeding. That approved labor certification relates to a different (still-pending) petition, and it does not demonstrate or imply eligibility for the waiver.

The petitioner stated:

> I believe that after being in this country since 1994 as a law abiding alien, going to language schools . . . , completing my law master's degree . . . , working for U.S. employers . . . and paying taxes is certainly enough for someone like me to be able to stay in this Country. I believe that the decision [to the] contrary would violate the fundamental fairness and substantial justice.

The waiver must serve the national interest. None of the factors identified above establish eligibility for the national interest waiver.

With respect to the *NYSDOT* guidelines, the petitioner stated:

> [M]y services are so unique that it is unimaginable to think that there would be a U.S. worker who will have similar qualifications to mine.
>
> On the contrary, I will create jobs for U.S. citizens.

The petitioner has already been working, for several years, in the same capacity for which she seeks the national interest waiver. The petitioner did not provide any statistics or documentary evidence to show that her work to date has created significant numbers of jobs for United States workers.

Regarding her background, the petitioner stated:

> I have represented banks, start ups and large corporations in Turkey as [a] Commercial Litigator/Trade Lawyer. . . . I can competently mediate between Turkish traders [and] their American counterparts. . . . I understand both cultures very well. . . .
>
> I would serve the national interest better [than a qualified United States worker] due to my experience in two different worlds. . . .
>
> I believe that my origin from a different religious, cultural and educational background has served, and will continue to serve the national interest.

The petitioner's national origin is not, itself, grounds for granting the waiver. *NYSDOT* calls for a past history of demonstrable achievement with some degree of influence on the field as a whole (*id.* at 219, n.6); cross-cultural perspective is not an influential achievement. The petitioner identified no specific instances by which her background helped her to achieve beneficial outcomes that would have been unobtainable for other attorneys. She offered only the general assertion that her background makes such outcomes possible. Going on record without supporting documentary evidence is not sufficient for

purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

The AAO rejected the petitioner's appeal on February 27, 2012, and the director issued a second denial notice on April 25, 2012, stating that the petitioner had failed to submit "evidence about [her] accomplishments within [her] field." The petitioner's appeal from that decision includes a brief dated May 22, 2012.

The petitioner asserts that her work in the legal field has substantial intrinsic merit. The director, in the 2012 denial notice, stated that the petitioner had not met this threshold because "a statement alone cannot be determined as evidence that [her] work has substantial extrinsic [*sic*] merit." The petitioner has sufficiently established that legal advice and assistance, provided by a professional with proper credentials, has substantial intrinsic merit.

With respect to national scope, the petitioner asserts that "[a]ll individuals/corporations/organizations in every part of the United States would benefit from [her] experience and education." The petitioner, however, did not submit evidence to show that her intended employment at would involve a national rather than local clientele. Because the petitioner has already worked for for several years, such evidence should already exist; it is not a matter of speculation. The petitioner has not established that her intended work will produce benefits that are national in scope.

Regarding the third prong of the *NYSDOT* national interest test, the petitioner states that, with regard to "Turkish Commercial Law consultations," "US entities rights will be better protected by being served with a person with dual licenses" to practice law in both Turkey and the United States. Even if one disregards the possibility that a United States attorney could hold "dual licenses" as the petitioner does, possession of professional credentials is not a demonstrable history of influential achievement.

The petitioner states:

> I have already established that my past record justifies projections of future benefit to the national interest. . . . [F]or the past 18 years I have worked . . . for three different companies as International Legal Consultant and I am a licensed attorney in New York. I have done internal FCPA investigations for US companies for their corporate compliance. . . . I can finally combine all my education and experience into opening my own practice and in this process I can employ U.S. workers and/or work on consultation basis with U.S. employers who have Turkish counterparts. By the same token, I can help Turkish employers intending to do business in the United States, which would also benefit the interest of the United States.

The petitioner has not established that her length of experience and the identities of her employers amount to a demonstrable history of influential achievement. The listed facts describe the petitioner's employment history but do not show it has been particularly influential. It is significant

that the petitioner, above, asserts that she intends to establish her "own practice and . . . employ U.S. workers." Elsewhere (as discussed previously), the petitioner maintains that USCIS should take her approved labor certification under consideration. That labor certification, however, was for a specific offer of employment from , not for the petitioner to establish her own law practice.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.